IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION.

CHAMBER SUMMONS No. 1940 of 2007
WITH
SUIT No.1419 OF 1979

Tata International Limited ..Plaintiff.

Vs.

ICICI Bank Limited ..Defendant.

Mr A. S. Khandeparkar i/b Khaitan & Jaykar,
Advocate for the Plaintiff.

Mr U. A. Mahajan i/b Divekar & Co. for the
Defendants.

CORAM: V.C. DAGA,J.
DATED: 19TH DECEMBER,2007.

ORDER:-

1. This suit was originally filed by plaintiff-Company; named; as Tata Exports Limited against defendant-Sangli Bank Limited. Subsequently, original plaintiff-Company was reconstituted and renamed as "Tata International Limited" whereas, the defendant "Sangli Bank Limited", by virtue of the scheme of amalgamation, merged with ICICI Bank Limited, (the defendant-bank for short). All these subsequent events have resulted in substituting the names of the parties to the suit. The same are reflected in the amended cause title of the suit.

Factual Matrix:

2. The factual matrix lie in very narrow compass. It is not disputed that the defendant bank failed to honour performance of guarantee dated 13.3.1978 issued by it on behalf of its constituent M/s Vishal International, Bazar Street, Bombay-1. It is not in dispute that the bank guarantee issued by the defendant-bank on 13.3.1978 was to remain valid for 90 days from the date of issue. It was invoked by the erstwhile M/s. Tata Exports Limited on 12th June, 1978, in view of the alleged breach of contract comitted by the constituent of the defendant bank M/s Vishal International Limited. Thus plaintiff requested for remittance of the amount guaranteed by then defendant-bank, which bank failed to remit. Hence the plaintiff is seeking recovery of the amount guaranteed by the defendant-Bank.

3. On being summoned, the defendant-bank appeared and filed its written statement denying its liability on various grounds. One of the grounds in defence is that the bank

guarantee was invoked after expiry of 90 days, hence bank was justified in not honouring the subject guarantee.

4. The defendant-bank admitted three documents filed by plaintiff; namely, bank guarantee dated 13.3.1978 issued by it and letter dated 12.6.1978; whereby the bank guarantee was invoked by the plaintiff and yearly calender for the year 1978 to demonstrate that 90th day i.e. 11th June, 1978 was bank holiday being Sunday. Consequently, these three documents were marked as Exhs.P-1 and P-3 on admission.

5. Considering the rival pleadings, issues were framed on 27.1.1998. One of the issues is as under:-

> "5. Do defendants prove that the guarantee had expired on 11th June, 1978 and, therefore, the plaintiff's claim under the guarantee ceased to exist in force as alleged in para 11 of the written statement?

6. Subsequently, on 14.3.2007 one more issue was framed for being tried as

"Preliminary Issue", reading as under:-

> "Whether the bank guarantee in question had already expired on the date of filing of the suit as contended in para 11 of the written statement?"

7. The plaintiff has taken out Chamber Summons No. 1940 of 2007 to seek deletion of the above preliminary issue framed on 14.3.2007, contending that the said issue could not have been framed as preliminary issue, since it involves mixed question of law and fact and that the genisis of the aforesaid issue is already covered by issue No.5 framed on 27.1.1998 (extracted in the opening part of para 5 (supra).

8. The aforesaid Chamber Summons was opposed by the defendants contending that in view of admission of the documents; no oral evidence is required to be taken. The issue being pure question of law, entire suit can be disposed of on this issue. It does not require any investigation of facts, hence it should be heard and decided as preliminary

issue.

9. During the course of hearing, both parties agreed that the issue framed on 14.3.2007 be deleted and issue No.5 framed on 27.1.1998 be tried as preliminary issue on its own merits. Consequently, both parties were directed to circulate their additional affidavits, if any, together with the compilation of judgments on which they propose to rely. Accordingly, the plaintiff has circulated compilation of judgments but the defendants did not. However, both parties, as agreed, advanced their oral submissions on the merits of the issue and jointly prayed that issue, itself be decided on merits. Accordingly, parties were heard.

SUBMISSIONS:-

10. Learned counsel for the defendant-bank urged that the bank guarantee is tripartite contract between the parties. That the terms of the bank guarantee dated 13th March, 1978 are absolutely clear. In his submission,

guarantee ought to have been invoked within 90 days from the date of its issue i.e. on or before 11th June, 1978. That it was involked after expiry of 90 days i.e. on 12th June, 1978, as such bank was not liable to honour the same.

11. The contention of the defendant bank is that, it is immaterial whether 11.6.78 i.e. 90th day was bank holiday. If it was so, the plaintiff was well aware that 90th day would fall on Sunday, as it was all the more necessary for the plaintiff to invoke bank guarantee on 89th day, rather than waiting till the arrival of 90th day. That contract between the parties was not to govern by any statute, as such, the provisions of General Clauses Act or Negotiable Instruments Act could not be invoked to claim benefit thereof. In nutshell, submission is that with the expiry of 90th day, bank was absolved of its liability to honour the subject guarantee. Since the guarantee was invoked by the plaintiff after expiry of the validity period mentioned therein, the bank has rightly denied remittance of the proceeds guaranteed under

the subject bank guarantee.

12. Per contra, learned counsel for the plaintiff submits that the bank guarantee was rightly invoked on 12.6.1978 i.e. 91st day since the 90th day i.e. 11.6.1978 was a "Sunday" (bank holiday). That on 90th day nobody would have accepted letter of the plaintiff invoking bank guarantee. The bank would not have honoured its commitment under the bank guarantee since bank was closed on that day on account of Sunday/holiday. He submits That nobody can be asked to perform the act which cannot be performed by the reason of circumstances beyond control.

13. Learned counsel for the plaintiff went on to submit that if one cannot perform an act by reason of circumstances beyond control, then that lperson stands relieved against the consequences of his default by reason of the maxim" lex non cogit ad impossibilia and actus curiae neminem gravabit" (the Law does compel man to do which he cannot possibly perform), if he performs the act at the next available opportunity.

14. Learned counsel for the plaintiff further submits that under Section 25 of the Negotiable Instruments Act ("the N.I.Act" for short) when the day on which a promissory note or bill of exchange is at maturity is a public holiday, the instrument shall be deemed to be due on the next preceding business day. According to him, the expression "public holiday" includes "Sundays" and/or any other day declared by the Central Government by notification in the official Gazette, to be a public holiday. The learned counsel for the plaintiff borrowing assistance from the said Section 25 of the N.I.Act submits that the principle and spirit of the said Section can very well be applied to any banking instrument.

15. Learned counsel for the plaintiff also placed reliance on the ratio of Section 10 of the General Clauses Act and went to submit that the principle underlying therein can very well be pressed into service. He placed reliance on the judgment of the Apex Court in the case of **Huda and Another vs. Dr.Babeswar**

Kanhar and Another (2005) 1 S.C.C. 191 to support his submission.

Question for Determination:

16. Having heard rival views, the question that arises as to what is the principle which should be applied in a case where a party to the contract of guarantee is given time to do an act within a specified day for or by a specific day and fails to do it on the ground of impossibility of performance on the last date specified but does it on next practicable day.

Consideration:

17. At the outset, I must mention that both parties proceeded to argue this matter on the premise that 90th day was 11th June, 1978 and it happened to be bank holiday being Sunday. As such without considering the question as to from which day the period would begin to run, I am proceeding to decide the issue treating 190th day being bank holiday.

18. Firstly, let me turn to the submission advanced by the learned counsel for the defendant bank that the plaintiff had practically 89 days time; at its command to invoke bank guarantee as such it should not have waited for the last day of the period allowed to it under the bank guarantee. That if the plaintiff did not act diligently while invoking bank guarantee. According to him, a day before its expiry guarantee could not have been invoked. The plaintiff, therefore, must suffer the consequences, if the bank happened to be closed on 90th day on account of holiday.

19. In this case, plaintiff had a right or, perhaps more accurately, the liberty to invoke bank guarantee till and including 90th day. In **Hulsbury's Laws of England Vol. 37, 3rd Edition, Page 96,** it is observed:

> "Subject to certain exceptions, the general rule is that, when an act may be done or a benefit enjoyed during a certain period, the act may be done or the benefit enjoyed upto the last moment of the last day of that period."

20. In my considered view if the plaintiff

had the right to invoke bank guarantee till and including 90th day i.e. including 11.6.78 under the terms of guarantee the fact that the plaintiff did not choose to invoke prior to that period would not affect its right or liberty to invoke on 90th day.

21. Having said so, the next question which needs consideration is, what should happen if the performance on the last date specified becomes impossibility of performance and the act is performed or done on the next practicable day. One can conveniently answer this question on the basis of the judgment in the case of **Madura Co. Private Limited vs. A. Thangal J.M. and Anr, A.I.R. 1964 Kerala 190;** wherein the term of the contract between the private parties provided that a suit for damages should be brought within one year from the date of delivery of the goods or from the date the goods should have been delivered. The consignee did not bring suit within the prescribed period due to the fact that Court was in recess. Hence suit was brought on the date on which the Court reopened, although by that time, the prescribed period had expired.

The Kerala High Court held that the suit was within time. It went on to observe that Section 10 of the General Clauses Act would not be applicable but principle embodied in the said Section and summed up in the maxims: "lex non cogit ad impossibilia and actus curiae neminem gravabit" could sustain the contention that the suit was filed within time.

22. The said Court also went on to hold that neither the right nor the remedy could be considered as extinguished because the non-filing of the suit stemmed not from any act or omission of the consignee but from the fact that the Court was in recess; and all that he could do, namely, the filing of the suit on the date on which the Court reopened. That was done by the plaintiff.

23. The Court held that although the parties could not extend time for doing an act in Court, yet if the delay was caused not by any act of their own, but by some act of the Court itself - such as the fact of the Court being

closed, the suitor was entitled to do the act on the first opening day. The Court further observed that the condition could not be considered strictly a condition precedent where it was impossibility of performance in consequence of the offices of the Court being closed and there being no one to receive the plaint. The suit filed by the consignee immediately on reopening was held legal and valid.

24. The Kerla High Court while dealing with the question relied upon the judgment in the case of **Shooshee Bhusan Budro v. Gobind Chunder ILR 18 Cal 231** wherein the Calcutta High Court observed:

> "The question that arises for decision is, whether when a fixed period is given to do a certain act, and the person bound to perform it is, from no act of his own, but from some act or order of the Court, prevented from carrying it out, he gets the advantage of the next open day. The same point has been the subject of frequent discussion both at home and here. In the case of (1867)2 QB 410; the same question arose. The courts were closed from Good Friday until the following Wednesday, and it was held that the transmission of the

record on Wednesday was a transmission within the period required by the Act, although the period had expired. That case was followed in the case of Waterton v. Baker, (1868) 3 QB 173 and this has since been considered as the leading case in regard to these questions. The broad principle there laid down is that although the parties themselves cannot extend the time for doing an act in court, yet if the delay is caused not by any act of their own, but by some act of the Court, itself, such as the fact of the court being closed, they are entitled to do the act on the first opening day. This, then, is the general principle; and it has been followed in this Court. In the case of Hossein Alli v. Donzelle, ILR 5 Cal 906 a tenant was sued under Act VIII of 1869, and a decree obtained against him in the terms of Section 52 of that Act, which provides that if the amount of arrears, interest and costs be paid within 15 days from the date of the decree, execution shall be stayed. Owing to the court being closed it was impossible to carry out the express terms of the Act; but the amount was paid on the first opening day, and this Court, in conformity with the rules laid down in (1867) 2 QB 410, held that the payment was good.

25. So far as the Section 10 of the General Clauses Act is concerned, learned counsel for the defendant has rightly contended that it cannot be applied to private contracts but as held by the Apex Court, underline principle can very well be pressed into service.

26. At this stage, it will be profitable to

notice Apex Court judgment in the case of **Huda and another vs. Dr. Babeswar Kanhar and Anr (supra);** wherein Court held, as under:

> "What is stipulated in clause 4 of the letter dated 30-10-2001 is a communication regarding refusal to accept the allotment. This was done on 28-11-2001. Respondent no.1 cannot be put to loss for the closure of the office of HUDA on 1-12-2001 and 2-12-2001 and the postal holiday on 30-11-2001. In fact he had no control over these matters. Even the logic of Section 10 of the General Clauses Act, 1897 can be pressed into service. Apart from the said section and various provisions in various other Acts, there is the general principle that a party prevented from doing an act by some circumstances beyond his control, can do so at the first subsequent opportunity (See Sambasiva Chair v. Armada Ready). The underlying object of the principle is to enable a person to do what he could have done on a holiday, on the next working day. Where, therefore, a period is prescribed for the performance of an act in a court or office, and that period expires on a holiday, then the act should be considered to have been done within that period if it is done on the next day on Wichita the court or office is open. The reason is that law does not compel the performance of an impossibility. (See Hossein Ally v. Donzelle). Every consideration of justice and expediency would require that the accepted principle which underlies Section 10 of the General Clauses Act should be applied in cases where it does not otherwise in terms apply. The principles underlying are lex non cogit ad impossibilia (the law does not compel a man to do the impossible) and actus curiae neminem

gravabit (the act of court shall prejudice no man). Above being the position, there is nothing infirm in the orders passed by the forums below. However, the rate of interest fixed appears to be slightly on the higher side and is reduced to 9% to be paid with effect from 3-12-2001 i.e. the date on which the letter was received by HUDA." **(Emphasis supplied)**

27. Having noticed the aforesaid observations made by the Apex Court; whereunder underline principle of Section 10 of the General Clauses Act was made applicable even though it was not applicable to a private contract. Extending underline principle contained in Section 10 of the General Clauses Act, it can very well be said that "Sunday" being a non banking business day, it was not possible for the plaintiff to invoke bank guarantee on the last day. Therefore, it was rightly invoked on 91st day i.e.12th June, 1978, the next practicable day. The bank guarantee, in my considered view, was invoked within the period prescribed in the bank guarantee. No fault can be found with the act of the plaintiff.

28. In the result, the preliminary issue is

answered in favour of the plaintiff and against the defendant. Needless to mention that Chamber summons as well as preliminary issue stands disposed of in terms of this order with no order as to costs.

29. Stand over to 17th January, 2008.

(V.C. DAGA, J)